Supreme Court, U.S.
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90-1359

No.

IN THE

Supreme Court of the United States

October Term, 1990

CHARLES GOODACRE and PETER GRIM,

Petitioners,

against

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Petition for a Writ of Certiorari

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THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1991
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(5942—LC2-923)

QUESTION PRESENTED

Whether the state can satisfy its heavy burden of proving legitimate independent sources for its evidence where the departmental investigators compelled petitioners' testimony pursuant to a grant of immunity while they simultaneously conducted the criminal investigation for the state and there was both evidentiary and nonevidentiary use of this immunized testimony in violation of petitioners' Fifth Amendment privilege against self-incrimination.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHARLES GOODACRE and PETER GRIM,
Petitioners,

v.

NEW YORK,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

The petitioners Charles Goodacre and Peter Grim respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New York, Appellate Division, First Department, entered in People of the State of New York v. Peter Grim and People of the State of New York v. Charles Goodacre on October 16, 1990.

OPINIONS BELOW

The unreported opinions of the Supreme Court of New York, Appellate Division, First Department, affirming the decision and order of the Supreme Court, New York County, can be found in the Appendix.

JURISDICTION

The order of the Court of Appeals of New York, denying leave to appeal, was entered on November 29, 1990. The jurisdiction of this Court to review the judgment of the New York Supreme Court, Appellate Division, First Department, entered October 16, 1990, is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

U.S. Const. V Amendment

No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

City of New York, Police Department, Patrol Guide 118-9:

If a member of the service (uniformed or civilian) is under arrest or is the subject of a criminal investigation or there is a likelihood that criminal charges may result from the investigation, the following warnings shall be given to the member concerned prior to commencement of the interogation:

"I wish to advise you that you are being

questioned as part of an official investigation by the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel present at each and every stage of this investigation.

I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to departmental charges which could result in your dismissal from the Police Department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings. However, these statement [sic] may be used against you in relation to subsequent departmental charges".

The questions and answers resulting from the interogation conducted pursuant to this procedure are confidential. They are not to be revealed nor released to any person or agency outside the department without prior written approval of the Deputy Commissioner-Legal Matters. If a subpoena duces tecum is received for any such questions and answers, the Legal Bureau should be contacted immediately.

STATEMENT OF THE CASE

A. *Course of proceedings in the case now before this Court.*

On June 28, 1989, the petitioners were found guilty, after a jury trial before the Supreme Court, New York County, of assault in the second degree (New York Penal Law §120.05(1)).

On October 16, 1990, the Appellate Division of the Supreme Court of the State of New York affirmed the petitioners' conviction.

On November 29, 1990, petitioners' timely application for leave to appeal to the State of New York Court of Appeals was denied.

B. *How the Federal Question Was Presented.*

The federal question was first presented in a pre-trial motion to dismiss the indictments, dated July 12, 1988, on

the grounds that immunity had been conferred upon the petitioners pursuant to Police Department Patrol Guide Section 118-9. The motion to dismiss was denied, however, a hearing on the issue was directed pursuant to an order dated October 18, 1988. A hearing was commenced on April 24, 1989, pursuant to Kastigar v. United States, 406 U.S. 441 (1972) to determine whether any of the petitioners' immunized testimony was used by the prosecution in violation of their rights under the Fifth Amendment to the United States Constitution. (Trial Record at 1.)

Petitioners appealed the court's ruling on the federal question to the Supreme Court of New York, Appellate Division, First Department, which affirmed the decision of the trial court. (Appendix A)

C. *Introduction*

Around midnight of February 20, 1988, Touissant Vogelsang was the victim of an assault allegedly committed by several off duty police officers.

On the date of the assault, petitioners Sergeant CHARLES GOODACRE and Officer PETER GRIM were New York City police officers assigned to the Midtown South Precinct. On the evening of February 20, 1988, they attended a basketball game at Madison Square Garden in Manhattan with four other police officers, Sergeant JAMES DEAN, Sergeant ANTHONY DIRENZO, Officer GREG LEONE and Officer STEVEN GOLDEN. After the game, all of the officers went to a nearby bar. The People claimed that after the officers left the bar, they encountered complainant Vogelsang, a racial slur was directed at Vogelsang and that petitioner Grim punched Vogelsang. Vogelsang apparently left the

area, but returned and was again attacked by a group of men.

Following the incident, an investigation was immediately commenced by the Internal Affairs Division ("IAD").

Within the first three days of the investigation, both of the petitioners were compelled to testify pursuant to General Order 15 ("G.O. 15"). This provision is now Patrol Guide 118-9 of the Rules and Regulations of the New York City Police Department, which have the force and effect of law. Patrol Guide 118-9 requires an officer to testify under threat of job forfeiture. Information obtained pursuant to this provision can be used administratively by the police department, but cannot be used against the officer in a subsequent criminal proceeding. It was common practice for the IAD to obtain approval from the

district attorney's office before commencing questioning pursuant to G.O. 15 (484).[1]

Following the IAD investigation, after having been compelled to answer questions, petitioners GOODACRE and GRIM were indicted and charged with assault in the second degree.

On April 24, 1989, a pre-trial Kastigar hearing was commenced to determine whether petitioners' immunized testimony had been used by the prosecution in violation of their Fifth Amendment priviledge against self incrimination.

D. *The evidence at the Kastigar Hearing.*

In the early morning of February 21, 1988, Lieutenant CHARLES MONAHAN, was

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[1] All page references are to the actual page in the Trial Record containing the Kastigar hearing decision which is located at Appendix B.

summoned by his commanding officer, Captain Stone, to the Midtown South Precinct to investigate police involvement in the assault of Vogelsang. Both Monahan and Stone were members of the IAD. When Monahan arrived at the precinct at 8:00 a.m., Stone (deceased at the time of trial) informed him that an assault had taken place on 7th Avenue and 34th Street.

Within one hour, the assistant district attorney who prosecuted the petitioners' case, Susan Braver ("ADA Braver"), arrived at the precinct (10). Following a conversation between Captain Stone and ADA Braver, Stone declared that "[w]e are going to G.O. 15 the whole place" (13-14). At this time, both the departmental and the criminal investigations began.

At the time the investigation began, there was no written or "hard and fast"

policy mandating the IAD to use separate units to conduct the criminal investigation and the departmental interrogations of targets. In this case, both the departmental and criminal investigations were conducted by the same unit - Unit 2 (180).[2] In fact, Lieutenant JOHN KID testified that Unit 2 conducted the investigation for the District Attorney's office and no outside investigators were ever used (102-103). Unit 2 consisted of Monahan, Kid, Detective THOMAS ENG, Officer STEPHANIE RICH, Detective ANDREA SORRENTINO, Sergeants Robert Castellano and Villada, and Detective Aubrey Weeks. It was

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[2] While there was testimony which indicated that it was generally IAD policy to separate investigatory functions in situations such as this one, no explanation was given as to why this was not done here (98,105).

before this unit that the petitioners testified under a grant of immunity pursuant to G.O. 15.

As of February 22, 1988, when petitioner Grim testified pursuant to G.O. 15, there was no direct evidence implicating the petitioners in the assault.[3] Officer STEVEN GOLDEN and Sergeant JAMES DEAN, who were interviewed the day before, both stated that on February 20, 1988 they had gone to a basketball game with the petitioners and several other officers and that following the game the entire group went to McAnn's, a nearby bar. Golden stated that he and

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[3] Although the trial court refers to a photo identification of petitioners on February 21, 1988, this appears to be a simple mistake, as it points out later in its opinion that the first photo compilation and identification took place on February 22, 1988 (485-486).

Leone left the bar at approximately 11:45 p.m.; walked a few blocks, and encountered the assault upon Vogelsang; they attempted to intervene; and during the course of the events Leone was struck in the face by a man wielding a "2 x 4." Neither Golden nor Leone implicated the petitioners in the assault. Further, neither officer provided a description of the petitioners or the time that the petitioners left the bar.

Similarly, neither of the two civilian witnesses implicated the petitioners. While each recounted the events regarding the assault, only one witness, Rodney Grant, provided any type of description of the assailants. Grant, who was arrested for striking Leone, stated that there were several white males involved in the assault upon Vogelsang.

Monahan also testified that before he

obtained the petitioners' G.O. 15s, he had a description of one of the men who assaulted Vogelsang. This description was limited, however, to the fact that the assailant was wearing a green army jacket.

When petitioner Grim testified pursuant to G.O.15 on February 22, 1988, he was already a target of the investigation. In fact, the trial court found that Grim was a target as early as the morning of February 21, 1988. IAD asked Grim to describe his clothing. Grim also told the IAD that he was at the basketball game and that afterwards he went to McAnn's bar with the other officers. At the bar, he met two friends, CHRISTOPHER WALDRON and Christine Murphy. Grim stated that he and petitioner Goodacre left the bar after about one hour and walked directly to Goodacre's car without encountering complainant

Vogelsang, and then drove home. (27-29, 353).

On the same day of Grim's G.O. 15, Officer Rich interviewed Waldron, whose identity was discovered only because of Grim's G.O. 15 (471). Rich testified that Waldron placed Grim at the bar from 11:30 p.m. to about 12:20 a.m. Waldron stated that Grim invited him to a party at the Hyatt Hotel, but that when he arrived at the hotel, Grim was not there (434-435). Prior to the matter being presented to the Grand Jury, Waldron's statement was summarized and placed in the IAD folder which was given to ADA Braver (383).

ADA Braver later summoned Waldron to testify before the grand jury which indicted the petitioners. Waldron's grand jury testimony revealed petitioner's alibi defense prior to trial. With this knowledge, ADA Braver used Waldron's grand

jury testimony at least five times during the petitioners' trial for the purpose of impeaching Waldron. Waldron testified at trial as an alibi witness for the defense.

On the evening of February 22, 1988, after Grim's immunized statements had been obtained, Detective Sorrentino conducted a canvass of the area where the incident occurred. Sorrentino brought a photo array with her which included pictures of the petitioners. She interviewed Greg Nelson, who told her that he had witnessed the incident and then picked petitioner Grim out of a photo array. (204-209).

The following day, February 23,1988 petitioner Goodacre testified pursuant to G.O. 15. Like Grim, he also stated that he was at the basketball game and had gone to McAnn's bar. Goodacre stated that he was at the bar for forty-five minutes to one hour when he left with petitioner

Grim, who drove him home because he was not feeling well. (47-48). Goodacre also provided Monahan with a description of what he was wearing the night of the incident.

After Goodacre testified, Detective Sorrentino compared his immunized testimony with Grim's. She testified that she did this because every piece of information had to be considered and analyzed. Moreover, Sorrentino admitted that the comparison was made for the purposes of furthering the investigation (246).

Monahan also made investigatory use of Goodacre's immunized testimony attempting to verify the time that Goodacre stated he had left the bar. Monahan did this by questioning two bartenders who were working on the night of incident. The bartenders statements

were then summarized, placed in the IAD file and delivered to ADA Braver prior to presentment to the Grand Jury (384-385).

The same day Goodacre testified, Officer Rich and ADA Braver, along with Lieutenant Kid, interviewed complainant Vogelsang (423-424). Rich reported that Vogelsang identified the petitioners from a photo array (418, 422). Rich also testified that she reviewed each petitioner's G.O. 15 (423). Although it is not clear whether Rich read the petitioners' immunized statements prior to interviewing Vogelsang, Detective Sorrentino testified that briefings were held with unit members on a daily basis (185). Detective Eng testified that a G.O. 15 is considered something new and that whenever "there was a new development in the case, whoever was involved in the case would know about it." (124).

On February 25, 1988, Monahan directed Sorrentino to interview Christine Murphy, who Grim had named as an alibi witness at his G.O. 15. According to Sorrentino, Monahan told her that "Grim had mentioned that he had been with certain people that night and that it was our responsibility to check that." (164). A summary of Murphy's statement was placed in the IAD file and delivered to ADA Braver prior to the presentment of the matter to the Grand Jury (471).

Based on information provided by Murphy, Monahan checked the Long Island Railroad departure times (355-356). This appears to have been a critical inquiry, as Monahan stated that time was an essential element of the investigation (374).

Four days after the IAD obtained Goodacre's immunized testimony, Monahan

and Sorrentino interviewed Rodney Johnson. Johnson selected Goodacre from a photo array as one of the men involved in the assault upon Vogelsang. Although Johnson also thought he recognized petitioner Grim, he did not positively identify him.

On April 5, 1988, Monahan delivered most of the IAD file to ADA Braver. While it was not clear whether all of the contents of the file were delivered at this time, the trial court found that the file had been delivered in its entirety during the month of April, 1988 prior to the grand jury proceedings (480). The only items removed from the file were the summaries of the petitioners' G.O. 15's (385, 471). The summarized statements of Christopher Waldron, Christine Murphy, and the two bartenders, however, were not removed.

In May 1988, grand jury proceedings

were commenced. Christopher Waldron was compelled to appear as a witnesses before the grand jury. Officer Rich, who had read petitioners' immunized statements and had gathered evidence for the grand jury, also testified. At the close of the proceedings, the petitioners were each indicted for the crime of assault in the second degree.

E. *The Trial Court's Kastigar Ruling and the Appellate Division's Decision on Appeal.*

At the conclusion of the hearing, the trial court rendered its decision. (Appendix "B"). The trial court concluded that the petitioners had met their initial burden of demonstrating that they made statements pursuant to a grant of immunity and that those statements were related to the prosecution (490). The court determined, however, that the prosecution

had proven an independent source for all the evidence introduced by a preponderance of the evidence (495-496).[4]

In reaching its decision, the court stated that there were only two possible sources of taint, the testimony of Detective Rich and Christopher Waldron's compelled appearance before the grand jury. The court, however, found that Rich's testimony was not a valid source of taint (491). With respect to Waldron, who testified that petitioner Grim had planned to meet him at a party which Grim failed to attend, the court concluded that Grim's failure to meet Waldron as planned did not substantiate the charges in any significant way (493). The court went on to conclude that "harmless error is

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[4] The court cited Byrd, which appears to be a reference to United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

applicable if, even without the immunized testimony, the People would have acted exactly as they did."[5] (495).

On appeal, the Appellate Division of the Supreme Court of the State of New York, First Department, affirmed the judgment of the trial court (App. A). In its affirmance, the court directed only one paragraph to the Kastigar issue and stated that "[t]he operative facts relative to the incident and the parties involved in the altercation were known prior to the time the Internal Affairs Division interviewed defendants, at least one of whom had previously been identified from a photo array." (Id.) The court

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[5] The court cited Gallo, which may be a reference to either United States v. Gallo, 859 F.2d 1078 (2d Cir. 1988) or United States v. Gallo, 863 F.2d 185 (2d Cir.), cert. denied, 489 U.S. 1083 (1988).

made no mention of the tainted grand jury testimony or of any other source of possible taint.

On remand, the petitioners were each sentenced to a term of imprisonment of between one and three years.

REASONS FOR GRANTING THE WRIT

I.

BY FAILING TO CONSIDER THE STATE'S NONEVIDENTIARY USE OF IMMUNIZED TESTIMONY, THE STATE COURTS PERMITTED THE VIOLATION OF PETITIONERS' FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN CONTRADICTION TO THIS COURT'S HOLDING IN KASTIGAR V. UNITED STATES AND THE HOLDINGS OF SEVERAL COURTS OF APPEALS.

In Kastigar v. United States, 406 U.S. 441 (1972), this Court upheld the constitutionality of the federal testimonial immunity statute because, although it compelled testimony, the statute conveyed immunity from the use and derivative use of compelled testimony.[6]

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[6] The immunity statute, 18 U.S.C. §6002, provides in relevant part that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." Kastigar, 406 U.S. at 460.

This Court held that such immunity was coextensive with the Fifth Amendment privilege against self-incrimination and that in any subsequent prosecution of the witness, the government must meet a heavy burden to show a legitimate independent source for its evidence. Id. at 460-461.

Since Kastigar, the courts of appeals have sharply divided on the issue of whether nonevidentiary use of compelled testimony violates the Fifth Amendment privilege. United States v. North, 910 F.2d 843, 857, modified, reh'g denied, in part, en banc, United States v. North, 920 F.2d 940 (D.C. Cir. 1990). In this case, both the trial court and the appellate court finding that the state satisfied its heavy burden under Kastigar, without having considered the state's nonevidentiary use of petitioners' immunized statements, is contrary to

specific holdings of the Third, Eighth and Eleventh Circuits. United States v. Hampton, 775 F.2d 1479, 1490-91 (11th Cir. 1985); United States v. Semkiw, 712 F.2d 891, 895 (3rd Cir. 1983); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); see also United States v. Dornau, 359 F.Supp. 684, 687 (S.D.N.Y. 1973), rev'd on other grounds, 491 F.2d 47 (2d Cir. 1974). Compare United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989); United States v. Mariani, 851 F.2d 595, 600-01 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); United States v. Crowson, 828 F.2d 1427, 1430 (9th Cir. 1987), cert. denied, 488 U.S. 1427 (1988); United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985) (all holding nonevidentiary use to be either permissible or permissible if

no evidentiary use).[7] Recently, the D.C. Circuit expressed uncertainty as to whether Kastigar prohibits nonevidentiary use and assumed without deciding that such use is impermissible. North, 910 F.2d at 858-860. The uncertainty regarding the constitutionality of nonevidentiary use, evidenced by the division of the circuits, has left the district and state courts unclear as to whether nonevidentiary use must be considered in determining whether the government has met its burden under Kastigar.[8] Therefore, it is apparent that whether Kastigar or the Fifth Amendment

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[7] The different holdings of Byrd and Hampton also evidences a split *within* the Eleventh Circuit.

[8] Even the courts of appeals which have not prohibited nonevidentiary use of compelled testimony have stated that it is a difficult question. Serrano, 870 F.2d at 16; Crowson, 828 F.2d at 1430.

prohibits nonevidentiary use is a question which warrants resolution by this Court.

Here, the state appellate court incorrectly affirmed the trial court's Kastigar hearing decision because the trial court found only two possible sources of taint. The courts failed to consider the significant nonevidentiary use which resulted from the state's extensive exposure and access to the immunized statements during all phases of the criminal investigation.

Nonevidentiary use has been defined to include use of the compelled testimony in "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy." McDaniel, 482 F.2d at 311; see also Mariani, 851 F.2d at 600; Crowson, 828 F.2d at 1430; Byrd,

765 F.2d at 1530; Semkiw, 712 F.2d at 895. Additionally, the Court of Appeals for the D.C. Circuit has defined nonevidentiary use to include instances where

> [p]rosecutorial knowledge of the immunized testimony may help explicate evidence theretofore unintelligible, and it may expose as significant facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments.

North, 910 F.2d at 858-9.

The definitions of nonevidentiary use provided by McDaniel and North encompass the use that the state made of the petitioners' immunized testimony in this case. Through their team of investigators, the state heard the petitioners' immunized testimony, analyzed them for consistency, attempted to verify information contained therein, and discovered the identities of petitioners'

alibi witnesses before trial. Furthermore, the prosecutor was regularly briefed on the progress of the investigation and learned the substance of petitioners' alibi defense by calling one of the alibi witnesses to testify before the grand jury.[9] In fact, one investigator admitted that the petitioners' immunized testimony was used for the purposes of furthering the investigation.

Such nonevidentiary use is prohibited under Kastigar, because this Court has

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[9] The uses delineated may also constitute derivative evidentiary use as the Court of Appeals for the D.C. Circuit has stated that "[o]ne forbidden use of the immunized testimony is the identification of a witness, but other uses of a citizen's immunized testimony -as by presenting the testimony of grand jury or trial witnesses that has been derived from or influenced by the immunized testimony-are equally forbidden." North, 910 F.2d at 865.

held that any grant of immunity in exchange for compelled testimony must be coextensive with the Fifth Amendment privilege against self-incrimination. Pillsbury v. Conboy, 459 U.S. 248, 254 (1983). In Kastigar, this Court explained that the federal testimonial immunity statute affords the same protection as the Fifth Amendment privilege as it provides a "sweeping prohibition of any use, direct or indirect, of the compelled testimony and any information derived therefrom," and "assur[es] that the compelled testimony can *in no way* lead to the infliction of criminal penalties on the witness." Kastigar, 406 U.S. at 460, 461 (emphasis added).

While declining to require transactional immunity to satisfy the Fifth Amendment, this Court responded to the argument that the immunity statute

does not guard against "the subtle ways in which the compelled testimony may disadvantage a witness" by stating that

> total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

Id. at 460.[10] This Court further stated that a person who is prosecuted after giving testimony pursuant to a grant of immunity "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." Id. Thus, the nonevidentiary use of compelled testimony, either subtle or overt, constitutes use in

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[10] The Court of Appeals for the Eleventh Circuit appears to ignore this language and has held that it is premature to bar nonevidentiary use because there is not yet an evidentiary use. Byrd, 765 F.2d at 1531-32.

violation of the petitioners' Fifth Amendment privilege against self-incrimination. McDaniel, 482 F.2d at 311 (forbidding all prosecutorial use of immunized testimony, not merely that which results in the presentation of evidence before the jury); Semkiw, 712 F.2d at 895.

Consequently, the failure of the trial court to consider nonevidentiary use in determining whether the state satisfied its heavy burden under Kastigar, overlooked the state's significant nonevidentiary use of the petitioners' immunized statements and allowed the state to violate the petitioners' Fifth Amendment privilege against self-incrimination. As such, the appellate court erred in affirming the trial court's holding because it failed to address or recognize the impermissible nature of nonevidentiary use. The appellate court's

silence on the issue, insofar as it may suggest that the nonevidentiary use which occurred was insignificant, also constitutes error because the trial court did not make a specific finding and appellate courts may not construe facts in the government's favor where it has the burden of proof. North, 910 F.2d at 855. Therefore, the petition for a writ of certiorari should be granted.

II.

AS THE STATE FAILED TO SEGREGATE THE IMMUNIZED STATEMENTS, THE STATE COURTS INCORRECTLY HELD THAT THE STATE HAD MET ITS HEAVY BURDEN UNDER KASTIGAR BECAUSE SEVERAL COURTS OF APPEALS HAVE HELD THAT EXTENSIVE EXPOSURE AND ACCESS CREATES AN INSURMOUNTABLE BURDEN REQUIRING DISMISSAL OF THE INDICTMENT.

In interpreting Kastigar, several courts of appeal have held that such exposure and access creates an insurmountable burden of proof for the

government. See e.g., Hampton, supra; Semkiw, supra; McDaniel, supra. Therefore, in view of the state's significant exposure and access, the decisions of trial court and the appellate court are erroneous as the state could not have satisfied its heavy burden under Kastigar.

Where the state fails to segregate the immunized statements, thereby leading to extensive exposure and access, the state's burden of proof is greater because "the possibility that the government compromised the defendant's immunity is heightened." Semkiw, 712 F.2d at 895; see also, Hampton, 775 F.2d at 1490; McDaniel, 482 F.2d at 311. The exposure resulting from the failure to segregate the immunized testimony causes "an immeasurable subjective effect" such that the government's burden of proof becomes

insurmountable. McDaniel, 482 F.2d at 311-312; Hampton, 775 F.2d at 1490. In the present case there was no such segregation, nor was it ever attempted, since the departmental investigation and the criminal investigation were simultaneously conducted by the same unit. Consequently, dismissal of the indictment is warranted as a remand would be futile. Hampton, 775 F.2d at 1491 n.54; McDaniel, 482 F.2d at 312.

Prohibiting nonevidentiary use where the government compels testimony does not create transactional immunity, as some courts of appeals have suggested,[11] because Kastigar specifically allows the government to prosecute so long as it uses evidence from legitimate independent

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[11] Serrano, 870 F.2d at 16; Crowson, 828 F.2d at 1429; Byrd, 765 F.2d at 1530.

sources. Kastigar, 406 U.S. at 461. This Court has stated that where an individual is compelled to testify, the immunity conveyed must be coextensive with the Fifth Amendment privilege leaving "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." Id. at 462.

In the present case, neither petitioners nor the prosecution was left in substantially the same position, as the state was able to use petitioners immunized statements both for evidentiary and nonevidentiary purposes, in violation of the petitioners Fifth Amendment privilege. The state had significant exposure to petitioners' immunized testimony by virtue of the fact that the individuals who conducted the criminal investigation simultaneously acted as the

departmental investigators who compelled petitioners' testimony.

The Second and Third Circuits have stated that the government can easily protect the witness' immunized statements by taking measures to segregate the statements from the prosecution. Semkiw, 712 F.2d at 895 (suggesting reassignment of the case); United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989) (stating that it may be necessary to construct a "Chinese Wall" to adequately guard against the use of immunized statements in violation of the fifth amendment). These measures may take the form of segregation and in the present case, the government need only have created a separate criminal investigative unit. Requiring protective procedures imposes no new burden on the government, because where the government decides to compel testimony pursuant to a

grant of immunity, it decides that it values the testimony more than prosecution. North, 910 F.2d 862. In so deciding, the government "must understand that the Fifth Amendment and Kastigar mean that it is taking a great chance that the witness cannot constitutionally be indicted or prosecuted." Id. In the case at bar, the state attempted to preserve both its interest as an employer and as a prosecutor. This it cannot do within the constraints of Kastigar or the Fifth Amendment. Therefore, because the state utilized the petitioners' immunized statements, the decisions of the trial court and the appellate court cannot stand.

Furthermore, dismissal of the indictment may be warranted because it may be the only remedy as it is the use of immunized testimony that is prohibited

under the Fifth Amendment and Kastigar. See North, 910 F.2d at 869; see also United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976) (Fifth Amendment is by its terms an exclusionary rule). There is no independent violation that can be remedied by the exclusionary rule and "the indictment becomes indistinguishable from the constitutional and statutory transgression." Id. at 869. Under these circumstances, the state's prosecution of the petitioners violated Kastigar and the petitioners' Fifth Amendment privilege.[12]

In the present case, the state courts failed to recognized the significant of the fact that the petitioners' immunized

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[12] Mere denials that it did not use the statements are insufficient to satisfy the burden that it had legitimate independent sources. Hampton, 775 F.2d at 1489; McDaniel, 482 F.2d at 312.

testimony would not have been available to the prosecution if the departmental investigators who compelled the testimony had not acted as the criminal investigators. Thus, the state was faced with an insurmountable burden of proof such that, even if the trial court had considered the state's nonevidentiary use, the state could not have satisfied its heavy burden under Kastigar and the indictment should have been dismissed. Therefore, because the state prosecuted the petitioners without proving an independent legitimate source for its evidence, in violation of petitioners' Fifth Amendment privilege against self-incrimination, the petition for a writ of certiorari should be granted.

Conclusion

For the reasons stated, it is respectfully requested that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: New York, New York
February 25, 1991

A P P E N D I X

New York Supreme Court
Appellate Division, First Department
Entered October 16, 1990
Kupferman, J.P., Ellerin, Wallach, Smith, Rubin, JJ.

40857 The People of the State of New York,
Respondent,

-against-

Peter Grim,
Defendant-Appellant.

40858 The People of the State of New York,
Respondent,

-against-

Charles Goodacre,
Defendant-Appellant.

Judgments of the Supreme Court, New York County (Harold Rothwax, J.), both rendered June 28, 1989, convicting defendants, after jury trial, of assault in the second degree, and sentencing each of them to indeterminate terms of imprisonment of from 1 to 3 years, unanimously affirmed. The case is remitted to the Supreme Court, New York County, for

further proceedings pursuant to CPL 460.50(5).

Defendants' claim that the prosecution made derivative use of their immunized statements is without merit. The evidence adduced at the Kastigar hearing (Kastigar v. United States, 406 US 441) established that the prosecution's evidence was derived from a legitimate independent source (Kastigar v. United States, supra; United States v. North, __ F2d __, 1990 US App Lexis 12106). The operative facts relative to the incident and the parties involved in the altercation were known prior to the time the Internal Affairs Division interviewed defendants, at least one of whom had previously been identified from a photo array.

The guilt of the defendants herein was proven beyond a reasonable doubt. At trial, Grim was identified by the victim

and two eyewitnesses, all of whom had previously identified him at a lineup.

Nor did the trial court err when it gave the jury instructions on accessorial liability. While the single count indictment did not contain the words "acting in concert", both defendants were charged with committing the same assault, on the same victim, at the same time. Defendants were convicted for the same crime for which they were indicted (People v. Iannone, 45 NY2d 589, 594), and the court's instructions did not change the theory of the case as it was presented and tried.

We also find no merit to the claims that the trial prosecutor should have been recused and that the trial court unduly interjected itself into the proceedings. Although there was concern at the hearing that the prosecutor might be a necessary

witness, defense counsel indicated that she would not be called, and no showing has been made that her testimony would have been relevant to any issue at trial (People v. Paperno, 54 NY2d 294, 302).

While the court indicated some impatience with the lack of clarity of questions addressed to the witnesses and with the slow pace of the proceedings, its criticism was directed at both the prosecution and the defense, as appropriate. The questions put to witnesses by the court constituted largely reformations of questions put by counsel, restated to provide greater precision as to the information sought to be elicited, with particular attention to the sequence of events. Without the court's assistance, the jury could have easily become confused about which of several similar occurrences was being discussed. Moreover, no

specific, meaningful objection was raised during trial (People v. Yut Wai Tom, 53 NY2d 44, 56).

Finally, the contention raised by defendant Grim that the court should have charged the jury on the defense of justification is without merit. While the inconsistency of the asserted alibi defense does not preclude the right to a justification charge (People v. Padgett, 60 NY2d 142; People v. Steele, 26 NY2d 526), in view of the severity of the beating sustained by the complaining witness, there is no reasonable view of the evidence, construed most favorably to the accused, upon which the jury could have concluded that the defendants' conduct was justified (Penal Law §35.30[1]; People v. McManus, 67 NY2d 541, 549). Nor could the jury have found that the defendants, off duty police officers at the time of the

incident, employed force in the course of making an arrest as no arrest was ever effected. Indeed, when pressed by the court, defense counsel could state no theory which would warrant an instruction to the jury on the defense of justification.

We have considered defendants' remaining claims and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTER:

ENTERED OCT 16 1990

FRANCIS X. GALDI

Clerk

SUPREME COURT ; NEW YORK COUNTY

CRIMINAL TERM PART 56

The People of the State of New York

-against-

Peter Grim and Charles Goodacre

Defendants

Indictment No. 04300/88

Wade Hearing/Kastigar Hearing

Decided May 1, 1988

Before the Honorable Harold J. Rothwax

Trial Record:

The Court: All right, the Court will make the following findings of fact and conclusions of law:

The Court finds that on February 21, 1988, that Lieutenant Charles Monahan of

the Internal Affairs Division of the Police Department, arrived at the Midtown South Precinct at about eight o'clock in the morning.

He had been advised or was advised when he [469] arrived that there had been an assault the previous night on February 20, 1988, at Seventh Avenue and 34th Street, and that off-duty police officers may have been involved in that assault.

At the precinct with him either at the time he arrived or shortly after was Captain Stone, now deceased, Sergeant Castellano, Police Officer now Detective Rich, and Detective Weeks; Assistant District Attorney Braver arrived at the station house at about nine a.m. and conferred with Captain Stone.

A complainant in the assault was at the hospital. There was also a witness from the assault, one Lafayette Bridget.

Thereafter, Lieutenant Monahan was advised that they were going to G.O. 15 the first platoon.

Let me state, for the purpose of this hearing, that G.O. 15 and P.G. 118-9 have been utilized interchangeably throughout this hearing. For the present purpose I conclude that they have the same legal force and effect. Apparently G.O. 15 refers to a General Order 15, subsequently replaced by what is known presently as Patrol Guide 118-9.

In that kind of a situation a defendant -- withdrawn.[469].

A police officer who is being investigated is advised that if he answers questions, neither his statement nor any information or evidence gained by reason of such statement can be used against him in any subsequent criminal proceeding.

However, those statements can be used

against him in relation to subsequent departmental charges and the Court accepts for the present purpose of having been given advisory warnings under 188-9, if the officer refused to respond he would be subjected to either suspension or dismissal from the force.

As I indicated, these two defendants, Grim and Goodacre quickly became targets, and they were targets as of the morning of February 21, 1988.

Lieutenant Monahan had been advised that they were going to G.O. 15 the first platoon. The first platoon had been a platoon that went on duty about eleven-twenty-five p.m. on February 20th and off duty at about eight a.m. on February 21st.

Neither Goodacre nor Grim were members of that first platoon. I accept that, that whole platoon was G.O. 15'd.

Lieutenant Monahan subsequently spoke

to Police [471] Officer Grim at Health Services in Queens on February 22, 1988, between 12:15 p.m. and 12;45 p.m.

I have a recording of that interview which is Defense Exhibit C in evidence. Present at that interview were Captain Stone and the officer's attorney, one Mr. Maguire. No Miranda warnings were given to the witnesses at that time.

It is clear that as of the time that officer Grim was interviewed the police did not know of Christopher Waldren or Miss Murphy, and that later on they were interviewed by police officials, and those interviews were turned over to the district attorney at a subsequent time.

The summary of Officer Grim's statement at that interview was found at page 16 of the I.A.D. file. It should be clear that prior to the time when Golden -- prior to that time when Grim was

interviewed on February 22nd, that Police Officer Golden and Sergeant Dean had already been interviewed and tape recordings, now People's 7 and 8 in evidence, were obtained.

They were also interviewed pursuant to 188-9. Golden and Dean indicated prior to the interview and thereafter with Goodacre, that Grim and [472] Goodacre had taken lost time at about eight thirty in the evening of February 20th; that all six officers, that is, Golden, Dean, Direnzo, Leone, Grim, and Goodacre, had gone to a basketball game and after the basketball game had gone to McAnn's Bar.

In any event, police records were also -- have indicated that the officers signed out at about eight thirty in the evening in order to go to a basketball game, although those records do not indicate where they went thereafter.

I find that approximately twelve G.O. 15s were prepared prior to the time that Officer Grim was interviewed; that nineteen police officers were interviewed pursuant to G.O. 15 after Police Officer Grim.

I find that the officers learned nothing of any substantial use through the investigation from Officer Grim that they would not otherwise have learned except for the possible involvement -- except for the possible presence of witnesses Waldron and Murphy at McAnn's Bar, to which I will address myself later.

Officer Grim basically indicated what the police officers already knew, that he had been doing [473] a four-to twelve tour, that he stopped at eight thirty and took lost time to go to a basketball game; that he sat with Golden, that all six thereafter went to McAnn's Bar.

Thereafter, Officer Grim, on his own

said that he was at the bar for about an hour, that he met a friend from Queens, with his fiance, that he left McAnn's Bar with Goodacre at about -- withdrawn -- that he left with Goodacre after about an hour to go to 36th Street and Ninth Avenue to get Goodacre's car. That he observed nothing at 34th Street and Seventh Avenue. And that he denied any involvement in the altercation that had taken place, which I.A.D. was investigating.

Sergeant Goodacre was likewise interviewed, his tape is in evidence as Defendant's Exhibit A, pursuant to G.O. 15 on February 23, 1988, between three and three twenty in the afternoon.

I find that both Grim and Goodacre made their statements under the provisions of P.G. 118-9, and that they made their statements understanding that those statements could not be used against them

in any criminal investigation and that criminal proceedings -- and that they had both use and derivative [474] use immunity.

When Sergeant Goodacre was interviewed -- I believe Sergeant Goodacre's interview was Defendant's Exhibit D. The Defendant's Exhibit A is the G.O. 15 which is in evidence, Defendant's Exhibit B is the tape recording of Sergeant Goodacre, and he was accompanied by his attorney, Mr. Fallek at the time of the interview.

His remarks are found at Page 31 os [sic] the I.A.D. file.

Like Officer Grim, he indicated that he had been doing a four-to-twelve tour and that he stopped at about eight thirty for a basketball game. That he went with five others thereafter to McAnn's Bar. That he stayed at the bar for forty five minutes to an hour, that he left with officer Grim, and basically he indicated what Officer

Grim had said before him, that they went to 36th Street and Ninth Avenue, that Grim drove Goodacre's car because Goodacre was not feeling well, and he also denied involvement in the altercation.

Lieutenant MOnahan [sic] indicated that he was aware prior to the interview of both Grim and Goodacre that pictures of these officers had been identified [474] by the people on the corner at the time of the incident, and by people in the emergency room at St. Vincent's Hospital, who were there with regard to Officer Leone.

The tape which had been interrupted at about 322, resumed at that time, shortly thereafter, and went on until 325 and Sergeant Goodacre continued to deny any involvement in the incident.

Lieutenant Monahan knew before the interviews with these defendants that all

six of these officers had gone to the basketball game and had taken off early.

They knew that a witness had said that Golden may have been involved in the assault on the complainant, and they had information regarding what the assailants were wearing at the time of the assault on Mr. Vogelsang.

They knew the complainant had reported that he had been involved with an altercation with six to eight male whites, that he threw a bottle and ran. The bottle struck an individual, that he was then [476] thrown down and beaten.

They knew chat -- they knew of Rodney Grant. The complainant, Mr. Vogelsang, had asked Mr. Grant to give him a hand, and Rodney Grant had picked up a two-by-four and hit one of the white men involved in the assault upon Mr. Vogelsang.

Officer Golden and Sergeant Dean were

present in the precinct at eight a.m. on February 21st. I have listened to the tapes of their conversation with the Lieutenant. They are in evidence as People's 7 and 8.

Additionally, Lieutenant Monahan had checked the log book, checked roll call, checked the record of the station house, which showed that all six were granted lost time, four hours of lost time, they got off about eight thirty p.m. Dean and Golden, as I have indicated, basically indicated about the lost time and going to the basketball game, and then to McAnn's Bar.

Sergeant Dean indicated that at the bar he had met a friend named Ray Durand.

Dean indicated that there came a time when he saw the complainant in a cab at the location of the assault, saw Golden with the arrested person, heard [476a] Leone had been injured, and he returned to the

precinct with Golden.

Rodney Grant was at the precinct under arrest for the assault on Leone, and Lafayette Bridgett was also in the precinct.[477].

Grant would have been arrested on -- for the assault on Leone, was interviewed on February 21st shortly before noontime at the precinct where he indicated that he had seen the complainant being beaten by three to four, or four to five, persons, white males, and believed that Golden, his arresting officer, was one of them.

He recounted the events leading up to the assault upon the complainant and his obtaining a two-by-four with which he hit Police Officer Leone and his arrest by Golden.

Assistant District Attorney Braver did the questioning of Mr. Grant. Bridgett was also interviewed on February 21st at 10:25

a.m. in the precinct and he was interviewed by Sgt. Chartier and Capt. Kincaid, and he also recounted the events leading up to the assault by Grant on Officer Leone.

There was also a George Hewitt at the station house that morning. George Hewitt was a cab driver who spoke to Sgt. Chartier and Capt. Kincaid regarding observing the beating and that one of the persons had said he was a cop.[478]

He was a male white, in plain clothes, with a green army jacket, and the cab driver assisted Mr. Vogelsang.

Capt. Kincaid also spoke to Officer Leone on February 21st at the Hospital and reported that Leone's statement had been basically the same as Golden's.

Lt. Monahan as a result of these interviews decided to prepare photo arrays on February 21 and prepared those photo arrays from the police department files.

Photos of all of the six officers who had taken lost time in regards to the basketball game were included in order to show those photos to the complainant, Mr. Vogelsang, Mr. Hewitt and Mr. Bridget, and also they were utilized for canvass purposes on February 21st.

As a result of the canvass on February 21st, persons were located at the frankfurter store at the location of the assault. A Mr. Nelson, a Mr. Morero, and a witness, Patten, were also located at the frankfurter store. I believe it is also a Nathan's.

Officer Sheehan and Egan were also all [479] interviewed on February 21st.

Officer Leone had been removed to St. Vincent's Hospital.

Lt. Monahan asserted, and I accept for present purposes, that he never gave the information he had obtained from Officers

Grim and Goodacre as a result of the P.G.118-9 of these two defendants to the district attorney, and that Capt. Stone had directed that the G.O.15 of these two defendants not be disclosed, and Monahan obeyed that.

Lineups were conducted involving both of these defendants on April 20th, 1988, at Poplar Street in Brooklyn, the I.A.D. headquarters, about 4:00 in the afternoon for each of these defendants. Those lineups were viewed by Mr. Johnson and by the complainant.

I find the procedures utilized were appropriate. The witnesses were told not to discuss the matter with each other. They were brought to the lineup separately. There were six people in each lineup.

Attorneys were present for each of the defendants who could have objected. Each [480] defendant chose his number and his

position in the lineup.

People's Exhibit 3 is the photo of the lineup of Sgt. Goodacre in which he is number 3 in that lineup, and People's number 4 is the photo of a lineup of Officer Grim in which he is number 2 in that lineup.

The witnesses were asked separately, did they recognize anyone. Mr. Johnson indicated separately, yes; he represented he recognized in one lineup Sgt. Goodacre, number 3, and Officer Grim, number 2.

The same process was repeated with Mr. Vogelsang and he made the same identification.

I do find that the I.A.D. file was made available to Assistant District Attorney Braver in April of 1988, prior to the Grand Jury in May of 1988, but that not included in that I.A.D. file were pages 16 and 31, which were the summaries of the

Grim and Goodacre worksheets, and also page 21, which is simply a duplicate of page 16.

I find that there did come a time that the investigation by the police department, in which [481] two bartenders from McAnn's were spoken to, one Brody and one Fitzgerald, and information derived from those interviews was conveyed to the Assistant District Attorney Braver.

Lt. Kid testified as well, February 23 he went to the hospital with Assistant District Attorney Braver and Officer Rich interviewed the complainant and showed a photostat of the police department identification photos which included Police Officer Grim, and Lt. Kid's memory of this was not as clear as that of now Detective Rich, whose recollection was far more clear about that. And I will go into that in a moment.

He indicated that the I.A.D. unit is

aware that G.O. 15 information was not to be disclosed to the district attorney, that no one ever asked him for G.O. 15s regarding these defendants, that the I.A.D. folder is kept in the file cabinet and he was not present in the G.O. 15s of these two defendants.

Det. Rich did testify that she was on Midtown South on February 21st, 1988, with Det. Weeks at about 10 a.m. She was present at the interview with Rodney Grant conducted by Assis- [482] tant District Attorney Braver. She prepared a worksheet and statement which the defendant signed, and made a taped statement of the statement that he made.

She also interviewed Toussaint Vogelsang February 23, 1988, with Lt. Kid and Assistant District Attorney Braver. She indicated that a photo array consisting of six separate folders, each with six

separate photographs, was prepared, one folder containing a photo of Sgt. Goodacre; that before showing the photo arrays to the complainant, they first asked the complainant for descriptions. The complainant gave descriptions of the two persons and couldn't identify two others.

People's Exhibit 5 now in evidence is one of the six folders which contains photos of Police Office Grim in which he is number 2 in that photo. That folder was shown to Mr. Vogelsang and he was asked if he recognized anybody and he said, yes, number 2 was one of the assailants, and additionally he initialed that photo or that portion of the photo right near that photo. [483]

People's 6 is also one of the six folders in which a photo of Sgt. Goodacre appears and is photo number 4, and the complainant likewise identified that photo

and initialed it.

Det. Rich also indicated that she never told Assistant District Attorney Braver of the contents of the 188-9 interviews of these defendants.

She did indicate that she interviewed Christopher Waldron and that the summary of that appears on page 17 of the I.A.D. folder; that she interviewed him on February 22nd; that Mr. Waldron indicated that he knew Police Officer Grim, that he was at the basketball game with Ms. Murphy, his fiance, and that Grim invited he, Waldron, to a party at the Hyatt Hotel, and that therefore he dropped off his fiance at the train station and went to the Hyatt Hotel, but he didn't see Officer Grim at the hotel.

He testified, that is, Waldron testified before the Grand Jury, and I will make further reference to his testimony

later.

Assistant Chief Frank Corsello testified he [484] is now retired from the police department, as one of July 1988, he was assistant chief of I.A.D and indicated there had been six C.I.U. teams under him during the time that he served as assistant chief; that in February of 1988 a 118-9 was in effect and applicable to Goodacre and Grim; that there was no written or hard and fast policy regarding separation of C.I.U. teams or modules with regard to those involved in a criminal investigation; that there had been such a practice in certain cases where there was an indictment or an indictment was imminent -- it is not relevant in this situation; and that there was no requirement or policy that would have required the separation to which the defense attorneys have alluded in this kind of case under the circumstances

at the time that the 188-9s were given to Grim and Goodacre; that he did confer, or it was common, that the I.A.D would confer with the assistant district attorney regarding the use of G.O. 15s, and if the D.A. had no objection then they would use G.O. 15.

The police department would not necessarily [485] defer to the assistant district attorney generally dependent on the seriousness of the charges. Ultimately it would be the Deputy Commissioner of Legal Affairs to decide whether the G.O.15s would be released. He does not have a present recollection of whether or not he had conferred with the legal affairs commissioner in this particular matter.

Det. Eng of the I.A.D also testified that on February 22nd, 1988, he became involved in this investigation; that he went to the Civil Complaint Review Board

regarding Officers Grim and Goodacre, and that he compiled the photo display arrays that were ultimately shown.

He also participated in an interview with Ray Durand on February 26th, and he went with Lt. Monahan for that purpose.

Sgt. Polacino of I.A.D. also testified primarily that he escorted witnesses to the lineup and back, that he knew of interviews of the defendants, G.O.15s of these defendants, but did not know of their substance, and that he had not had any contact with the assistant district attorney. [486]

He served subpoenas on the witnesses for the lineup, he did sit it on 118-9 interviews with other police officers, but not these police officers [sic].

He indicated that there was an unwritten procedure with regard to 118-9s, that 118-9 interviews would be separate

from other criminal investigations, to preserve the integrity of the investigation.

Det. Sorrentino of I.A.D. indicated that Lt. Monahan was his superior, that on February 22nd of 1988 he was doing a 4 to 12 tour, and that at that time he went to the scene on 34th Street and Seventh Avenue to do a canvass of the area with photo arrays, including the arrays containing the pictures of Grim and Goodacre; that he interviewed certain witnesses from the canvass, and he was not present at the G.O. 15 on [sic] either Officer Grim or Sgt. Goodacre. He did review, however, the G.O. 15 of Officer Grim shortly after February 22nd.

Some time between February 22 and February 29 he learned about Christine Murphy from Lt. Monahan and knew that Officer Grim had mentioned [487] Ms.

Murphy. And he interviewed Ms. Murphy on February 25 along with Lt. Monahan.

He also knew of Chris Waldron from the G.O. 15 of Officer Grim, but Mr. Waldron had previously indicated Det. Rich interviewed Mr. Waldron. He reviewed the worksheet of the G.O.15 interviews of both defendants but had not listened to the tapes. He did not go to McAnn's Bar as a result of the G.O. 15 of Sgt. Goodacre. He received daily updates from Lt. Monahan and he would have a number of conversations with A.D.A. Braver.

He indicated that when the Grand Jury was about to receiving [sic] evidence in late April the assistant district attorney had requested G.O. 15s of other police officers, not these two defendants, and he did not testify before the Grand Jury.

He did show photo arrays to various civilians on February 22nd and showed photo

arrays to Greg Nelson, who was one of the workers in the frankfurter store, and also to Rodney Johnson on February 27. By the photo arrays, it means the six folders, each containing six [488] photographs, for a total of 36 photos.

He asked when he showed those photos, do you recognize anyone, and he indicated that Nelson picked out Officer Grim. Also showed photo array to Rodney Johnson.

He interviewed witnesses who made identification after the lineup. He was not present to [sic] the lineup when they were conducted.

All right. Those are my findings of fact. And let me deal initially with the weight [sic][Wade] aspect of the hearing.

I have looked at the photo arrays which are in evidence, and I find them to have been extremely fair.

The argument had been made by Mr.

Dienst with regard to the photo arrays that his client is an Asian-American and that it was therefore an unfair photo array because Mr. Dienst alleges that Sgt. Goodacre was the only male Asian-American in the photo array.

I have previously said during the hearing, and I will repeat now, that Sgt. Goodacre may or may not be an Asian-American, and indeed if Sgt. Goodacre had been put in the photo array with six other Asian-Americans, it seems to me it would have been an unfair photo array precisely because he does not look Asian-American. That would have been an unfair photo array, to have put him in a photo array with five other people whom he did not look like.

As does appear in this photo array that I have seen in this case, it was a fair photo array.

Additionally, it seems clear to me

that Sgt. Goodacre appears to me to have white skin. I don't hold myself out to be an expert, but neither are the witnesses who viewed these arrays lineup experts, and it seems to me, as I have indicated, if he were in a photo array with five other Asian-Americans, he would stand out. He did not stand out in this photo array.

And this photo array, as was the photo array involving Police Officer Grim, was a fair photo array, fair and non-suggestive.

Similarly, in the lineup photos which were available to me, I find that the persons in the lineup bore similar physical characteristics with [490] regard to each of these defendants, and that there was nothing about the lineup makeup that was either unfair or suggestive.

Similarly, I find that the procedures followed by the police officer both during the showing of the photo arrays and during

the administration of the lineups were fair and non-suggestive, and the motion to suppress the pre-trial identifications is denied.

Now, the law is relatively clear with regard to the Kastigar aspect of this particular case.

First, I do find, as I indicated during the hearing, that the defendants have carried their burden of going forward, that is, that they have demonstrated that they made statements or testified under a grant of immunity to matters concerning the prosecution.

And having done that, the People have the burden of showing that their evidence is not tainted, by establishing that they had an independent legitimate source for the disputed evidence which is wholly independent of the compelled testimony.

Perhaps before going further with this

[491] aspect of the case, I ought to address myself to the Grand Jury minutes.

I have read -- I have reviewed the Grand Jury minutes in their entirety as submitted to me by Ms. Braver, and there are two possible sources of taint that arise.

The first relates to the testimony of Det. Rich of the I.A.D. Rich's testimony before the Grand Jury did not include any statements by these defendants on any information derived from G.O. 15s. She primarily testified about statements made to her by a Mr. Grant and the identification of Grim and Goodacre by Johnson and the complainant. That testimony did not contribute otherwise to identifying either police officers [sic] as the assailants.

I don't find that to be a valid source of taint in regard to either the trial or

the grand Jury minutes.

The second possible source of taint relates to Mr. Waldron, Chris Waldron, Mr. Waldron in his testimony. And I find that his identity was ascertained from Officer Grim. He was unable to say what Grim wore on February 20th when he left [492] the bar, or who he left with.

He did place Grim in the bar from 11:30 to 12:20 a.m., as did other police officers, and, parenthetically, I am advised he probably will be an alibi witness for Officer Grim and possibly Officer Goodacre at the time of the trial.

He also testified that, although Grim arranged to meet him at a party at the Hyatt Hotel after leaving the bar, Grim was not present when he arrived at 1 a.m., according to Grim's brother.

The Grand Jury was instructed by the district attorney to disregard this

statement as hearsay.

Waldron stated that he waited for 20 minutes at the Hyatt and he left. Obviously this might incriminate Grim since he did not appear as planned. However, it adds nothing material to prove the crime.

There are myriad [sic] innocent explanations for Grim's failure to appear at the hotel. The inference that he was in fact there at the time is also left open.

[493] I do not believe, given the district attorney's instructions to disregard the brother's statement to Mr. Waldron, that this contributed in any manner to the indictment.

Disregarding Waldron's testimony altogether, the evidence before the Grand Jury is sufficient, and Waldron's testimony does not differ in any respect from that of other witnesses.

His failure to meet Grim as planned does not substantiate the charges in any significant way, although it should be, it seems to me, excluded at trial.

The other police officers and police records establish that Goodacre, Grim and the other four signed out at 8 p.m. to attend the game at Madison Square Garden.

The police officers all concur that they left the game between 11 and 11:30 and went to McAnn's, where they remained at least 20 minutes.

No police officers attended the Hyatt party or testified about Grim and Goodacre's movement after leaving the bar.

No one knew what Grim wore.

The civilian witnesses testified that Grim, [494] Goodacre and two others beat Toussaint Vogelsang for approximately 15 minutes at about midnight following an argument and a chase.

In addition to two positive IDs, Johnson and Vogelsang, the cab driver Hewitt gave descriptions matching the others of Grim and Goodacre.

Officers Golden and Leone testified that they were present at the fight where Vogelsang was beaten, but that they could neither describe nor identify his assailants.

Leone admitted being struck by Johnson. Golden arrested Johnson.

A cashier at the Nathan's frankfurter stand, one Patten, corroborates both Vogelsang and Johnson. A second corroborating witnesses was Nelson, a restaurant manager. Neither of these witnesses made an identification, however.

The case in no way relies on the statements of the two defendants.

All right. To return then to the law, there is not really much in dispute between

the parties as to what the law is in this case. It seems to me that it is fairly clear, and the only issue is to apply the law to the facts. [495]

Let me then restate it.

Once the defendants demonstrate, as these defendants have, that they have testified under a grant of immunity to matters relating to the prosecution, the People have the burden of showing that their evidence is not tainted, by establishing that they had an independent legitimate source for the disputed evidence wholly independent of the compelled testimony.

The People's burden has been referred to as a "heavy burden," but the Byrd case indicates clearly that heavy burden means that they must show by a preponderance of the evidence an independent source for all of the evidence introduced.

In effect, the law states that the witnesses must be left in substantially the same position as if they claimed the Fifth Amendment privilege and had never testified at all.

The Gallo case, a Second Circuit 1988 decision has held that harmless error is applicable if, even without the immunized testimony, the People would have acted exactly as they [496] did.

I am satisfied that the People have met their burden. It is clear that there were a large number of independent legitimate sources wholly independent of the compelled testimony.

There were the police officers with whom these defendants went to the basketball game and thereafter to McAnn's.

There were the complainant and Mr. Johnson, who are identifying witnesses, and there were other corroborating witnesses,

such as Mr. Nelson and Hewitt and Patten.

And, having reviewed the extensive and lengthy Grand Jury minutes, I am satisfied that they were in no way dependent upon anything that these defendants in their largely exculpatory statements had indicated in their G.O. 15s.

The unexculpatory part of their statement placing--placing themselves in the vicinity and at the time are supplied by the other four police officers who were with them at the basketball game and at McAnn's Bar.

I do however indicate to Ms. Braver, as I did a moment ago, that it seems to me that she [497] should not elicit from Mr. Waldron, certainly not on direct cause, that when he went to the Hyatt Hotel, that Officer Grim was not present.

The foregoing is the opinion and decision and order of the Court.

SENTENCING MINUTES

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK,

Criminal Term : Part 56.

THE PEOPLE OF THE STATE OF NEW YORK,

against

PETER GRIM, CHARLES GOODACRE,

Defendants.

Index No. 4300-88

Charge: Aslt. 2

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100 Centre Street
New York, New York 10013
June 28, 1989

Before:

Hon. Harold Rothwax, Justice.

Appearances:

For the People: Susan Braver, Esq., Assistant District Attorney

For Defendants: Francis Ganun, Esq., Richard A. Dienst, Esq.

(2) The Clerk: Number 39 on the calendar, Peter Grim and Charles Goodacre.

Mr. Ganun: For the defendant, Peter Grim, Francis Ganun, 118-21 Queens Boulevard, Forest Hills, New York. Good morning, your Honor.

The Court: Good morning.

Mr. Dienst: For defendant Goodacre, Richard A. Dienst, 225 Broadway, New York, New York.

May we approach the bench with the District Attorney?

The Court: If you wish.

(Counsel for both sides approach the Bench in a discussion off the record.)

The Court: We'll have a further call so that counsel can review the presentence reports.

Further call on this matter.

(After further call, the following occurs:)

The Clerk: Recall number 39 on the calendar, Peter Grim and Charles Goodacre.

Mr. Ganun: For the defendant Peter Grim, Francis Ganun 118-21 Queens Boulevard, Forest Hills, New York. Good morning, your Honor.

Mr. Dienst: For the defendant Charles (3) Goodacre, Dienst and Surrance (phonetic), 225 Broadway, New York, New York by Richard A. Dienst.

Ms. Braver: Assistant District Attorney Susan Braver.

The Court: Each defendant was convicted after trial of the Class D violent felony of the crime of assault in the second degree and each of them appears here today for sentence. Counsel have filed motions to set aside the verdict on behalf of each defendant. Miss Braver has indicated to us that because she was away during the period when the motions were filed, she was not able to respond in writing.

I've asked the defense attorneys whether or not they wished an adjournment so that Miss Braver could respond in writing and they've indicated to me that they're content that she respond orally.

I have reviewed the motions on my own, so I'm familiar with their contents. Before we hear her response, you may wish to orally argue in support of that. The defendants can be seated while we're doing this.

You want to add to anything, Mr. Ganun?

(4) Mr. Ganun: Just to bring the Court's attention, your Honor, the main thrust of the motion to set aside is that based upon evidence or material that's in the record, that there was what we characterize as a Castargar, C A S T A R G A R, issue, the Castargar issue became evident during the course of the trial especially in the sense that it became admitted that the defendants, as police officers, were interviewed pursuant to the terms of 118-9 of the Patrol Guide. They were given assurances that anything they said and any product of what they had said would not be used against them.

The District Attorney took the tactic that she did not want to have specifically the statements of the particular defendant. She took the complete IAD file save their statements and went on with her preparation for trial.

I brought to the Court's attention the case of Castargar and also the case of McDaniel, your Honor, which seems to stand for the proposition that if the evidence as given to the prosecution is tainted by the former use of immunized testimony, that that taint, even if it's indirect—we (5) maintain that the taint in this case was direct but certainly was indirect in the sense that Mr. Grim made a statement. In the statement he said as to what his activities were on February 20th, 1988, where he went, who he met.

As a result of that statement, the District Attorney, through its investigators, could go out and check out and interview these individuals whom he claimed he met, which

they did. That statement led to the ability of the District Attorney to form or shape her prosecution in this case.

As the case of McDaniels points out, if the taint is even indirect and even if it forms the basis of the prosecution's tactics in the prosecution of the case, then the remedy should be a dismissal of the indictment and therefore, your Honor, based upon my statement here and my notice of motion which have been submitted to the Court, I respectfully request that the indictment in this case be dismissed and that the conviction be set aside.

The Court: All right. The record should reflect that before the trial in this matter, the case had been referred to me for Wade and Castargar (6) hearings and that a full Castargar hearing was held in this matter and I was satisfied that Castargar and its progeny did not preclude this prosecution from going forward. It seems to me, it's not necessary to repeat the record that was made at that time. Nothing that subsequently occurred at the trial did anything to, in my judgment, undermine the validity of the ruling that I rendered at the end of that hearing.

Did you wish to respond at this point in time, Miss Braver?

Ms. Braver: With respect to the Castargar hearing, your Honor, People's position remains what it was at the time of the hearing and we maintain that the use immunity which was granted to the defendants was honored and that nothing that occurred during the course of this trial abrogated his Fifth Amendment privileges as found in Castargar or in rulings in cases of this jurisdiction.

With respect to the other statements made in Mr. Ganun's motion to set aside the verdict, I believe they reiterate the facts which were heard at trial and heard by the jury and I will not (7) respond to them at this point. Clearly, suffice it to say, the jury found those facts that they regarded as compelling and convicted the defendant

accordingly and we believe that the motion to set aside the verdict should not be granted.

The Court: Mr. Dienst, do you wish to be heard?

Mr. Dienst: Yes, your Honor. Throughout this entire trial, any application made on behalf of the defendant Grim or any motion made on behalf of the defendant Grim was deemed to be made on behalf of Goodacre. Mr. Ganun has moved pursuant to Section 330.30 subdivision 1 and I would adopt that motion and—

The Court: I have no problem with your doing so.

Mr. Dienst: —and Mr. Ganun has indicated to me that for the 440 motion which I have made, he adopts the positions that I take on behalf of Police Officer Grim in connection therewith. I will not repeat the arguments that I raised in connection with General Order 15 on the issues that were decided by the Court at the Castargar-type hearing. They are fully set forth in my notice of (8) motion.

However, in addition to that, I believe that the verdict should be set aside under the following grounds: First, the defendant was charged in a single count with assault in the second degree. Neither the grand jury nor the District Attorney charged these defendants with acting in concert. However, during the course of the trial, it was the People's theory and the Court, over objection, charged that the defendants were acting in concert.

I respectfully submit, your Honor, that it was error for the Court to charge acting in concert when the jury in fact—the grand jury in fact had not found that they had been acting in concert or acting in any form of conspiratorial manner. At no time did the District Attorney move to amend the indictment, nor, in my opinion, would such an application to amend the indictment have been appropriate. Nowhere in any of the discovery material was there any indication that these defendants acted in concert. Basically, the case as tried constituted a different theory and the case submitted to the jury constituted a different charge than that which

was (9) set forth in the indictment by the grand jury. Most respectfully, neither the Court nor the District Attorney can substitute its judgment for the judgment of the grand jury as to what the charge may be in a particular case.

In addition to that, this verdict should be set aside upon the grounds that the People failed to establish beyond a reasonable doubt the intent of the defendant, Charles Goodacre, to inflict serious physical injury on Toussaint Vogelsang, nor was there any direct proof that Charles Goodacre inflicted any serious physical injury upon Toussaint Vogelsang, nor was there any proof that it was Goodacre who inflicted any injury whatsoever upon Goodacre (*sic*).

I don't wish to go through the testimony of the trial. Your Honor's recollection of it, I'm sure, is equal to if not better than my recollection but just as to one or two salient items.

Let us disregard for a moment, if we may, the alibi defense that was raised during the course of the trial which obviously was rejected by the jury. Let us assume, therefore, that Grim and Goodacre (10) were the persons who allegedly committed this assault. Testimony of the complainant, Mr. Vogelsang, clearly indicated that a tall blondhaired individual was the one who struck him in the jaw at the first encounter and at that pointed, fractured his jaw. He also testified that others, somewhere between four to six or at times six to eight others, tried to refrain or restrain that tall blond individual from further engaging in an altercation with Mr. Vogelsang.

The testimony thereafter, some twenty minutes later, Mr. Vogelsang came back and I think his testimony was that he was seeking vengeance; that he had obtained a broken broom handle and that he went after the persons who he had met in the previous encounter with the full intent of striking them with a broom handle in order to get vengeance. Again, the testimony was vague.

There was no testimony beyond a reasonable doubt to establish that it was the defendant Goodacre who had any intent or who in fact did inflict any serious physical injury upon the complainant Vogelsang. Assuming for the purposes of this argument but clearly not admitting that (11) Goodacre was present, the indications are that it was Goodacre who attempted to intercede and prevent any fight, intercede and prevent any altercation that occurred in the street. The evidence shows that it was only after Vogelsang attempted to attack whoever the group of individuals were with a broom handle that a fight in the street ensued but there has been no definitive evidence showing that this defendant inflicted any serious physical injury.

Now, aside from the failure of proof of the People to establish as a matter of law the guilt of this defendant beyond a reasonable doubt for that charge, we have another significant reason why this indictment should be dismissed and why the motion to set aside the verdict should be granted.

Prior to your Honor's charge to the jury, I requested a charge of justification. Although the defense of alibi was raised, I submitted to your Honor that the jury could choose to disbelieve the alibi defense and that the defense of justification would be appropriate based upon the evidence that was educed at the trial and most particularly, based upon the testimony of Toussaint Vogelsang, (12) that in the second incident he was the aggressor.

Again, most respectfully, your Honor, I submit the Court in its charge to the jury and its refusal to charge justification, committed reversible error which mandates this Court in the first instance to correct its error, set aside the verdict and grant the defendants a new trial based upon that issue.

I will not at this particular point in time go into what is raised in the motion papers as to what I consider, again most respectfully in my position as a defense attorney, to be

prejudicial conduct on behalf of the Court. They are contained in my motion papers and need not be repeated at this particular point in time.

The Court: Okay.

Mr. Dienst: Based upon the totality of the circumstances and the other issues raised in the motion, I join Mr. Ganun to set aside the verdict in this particular case.

The Court: You want to respond, Miss Braver?

Ms. Braver: Your Honor, I appreciate the opportunity afforded to respond orally in the case and the courtesy.

With regard to the first point raised by (13) Mr. Dienst, the grand jury clearly had all the evidence before it that was apparent at trial as well and there was clearly no change in the theory of the prosecution from the time it was presented to the grand jury until the time it was presented to the petit jury in this case. When the grand jury voted on that evidence, it clearly found and charged that both these defendants were actually intending to cause serious physical injury and that is exactly what the petit jury found as well and the law clearly reflects the culpability attendant to the acts of one who is found to act with the intent to cause serious physical injury when in fact such injury results.

I believe the evidence at trial throughout and the evidence replete throughout the entire IAD file which was available for many many months prior to counsel and which was in their possession reflect the theory of the prosecution always was that these two defendants were acting together throughout the incident up to and including the point in time during which Mr. Vogelsang was beaten. Therefore, I believe that the charge regarding acting in concert was perfectly consonant with the evidence (14) before the petit jury, as well as with the evidence before the grand jury and therefore, there was no change in theory which would require either a dismissal of the indictment or which would preclude the Court from reviewing the evi-

dence on a reasonable basis from assuming the grand jury intended exactly that, as well as the fact that they both acted as principals.

With regard to counsel's argument that the there was no proof beyond a reasonable doubt with respect to Mr. Goodacre's involvement in striking of the complainant, the beating, it was indicated to the jury the beating took place for approximately seven to ten minutes. It was also clear from the testimony of Toussaint Vogelsang that he implicated Mr. Grim was participating in that beating throughout.

It also was indicated by Rodney Johnson that he was positive that the defendant Goodacre participated in that beating throughout his opportunity to view Mr. Goodacre. Officers Golden and Leone clearly said there were only two people involved in the beating of Mr. Vogelsang.

The complainant did not appear to be injured (15) to either Mr. Johnson or to Mr. Greg Nelson when he returned to 34th Street where the second confrontation took place. He certainly—Mr. Vogelsang himself is certainly not qualified to determine at what moment in time an injury such as a fracture to the jaw occurred. That was certainly not the only injury that he suffered nevertheless. In fact, Mr. Vogelsang said he was all right when he returned to 34th Street to get his belongings.

Clearly, all his injuries were suffered during the course of the beating by the two individuals whom the jury, on the basis of substantial evidence, found to be these two defendants. I believe that, therefore, there was ample evidence for them to have concluded beyond a reasonable doubt that Mr. Goodacre as well as Mr. Grim intended to cause serious physical injury to Mr. Vogelsang and did so.

With regard to the third charge that Mr. Dienst raises as to his motion to set aside the verdict, he believes and he asserts that the charge of justification should have been given upon his request to the jury. I believe that there is no

reasonable ground in the evidence, no reasonable (16) basis in the evidence, to determine—for the Court to have found that a charge of that kind was warranted. The evidence at trial in fact established that Mr. Vogelsang was not the initial aggressor; that he had returned to 34th Street to get his belongings and even if he possessed a stick at that time, was going there with the intent to defend himself in the event that another assault was made upon him by a group of persons, he being alone at the time to his own belief and the evidence demonstrated that these defendants rushed Mr. Vogelsang at the time that he was holding that stick and that he did not in fact swing with that stick, if in fact he did so, until such time as he was rushed by what he believed to be an excess of two persons at that time and certainly, as he described it, at the very least, the first two people under the stairs, Mr. Grim and Mr. Goodacre.

Therefore, I don't believe there's any basis in the evidence to dem—to in—to warrant a charge of justification. Mr. Vogelsang at no time was the initial aggressor, nor at any time possessed the degree of force which would have required either of these two gentlemen to act (17) either in self-defense or in defense of another. Therefore, I believe that those grounds in support of the motion to set aside the verdict are insufficient to warrant such an action by the Court and as to the other grounds which are alleged in the papers, the Court was present throughout and I do not believe that any of those other grounds, including the allegation that counsel was prejudiced by any actions by the Court, have merit and does not require the drastic action of setting aside a verdict which was properly found upon sufficient evidence by a petit jury in this case.

Therefore, the People believe that the entire motion, the motion in its entirety to set aside the verdict should be denied.

The Court: All right, this was a one-count indictment in which the defendants were charged with assaulting the complainant in this case. It's clear that the theory of the People before the grand jury and the theory of the People before the trial jury was that the defendants were acting in concert. The defendants were not charged in separate counts in separate assaults. They were charged in the identical count and it's clear to me (18) that the failure of the defense attorney to understand and to realize that this was a charge of acting in concert is attributable to him and not to either the indictment or the District Attorney.

The issue of the defendant's intent is obviously a matter for the jury to decide based on all of the evidence before it. I'm satisfied that the jury was justified in concluding that each of these defendants intended to cause serious physical injury to the person they were found by the jury to have beaten. In my view, there was no basis for a justification charge.

The defendants did argue alibi and did argue that they weren't present at the time that the assault occurred. That by itself would not mean that justification could not be charged. Defendants under our system of law can charge inconsistent—can request inconsistent defenses.

The fact was that in this particular case, there was no reasonable view of the evidence under which the jury could have found that the persons who assaulted the complainant were acting in self-defense. Indeed, the testimony of witnesses and of complainant himself was that he was on his (19) back throughout the entire assault; that he kept on being beaten. In the event, he was in the hospital for two weeks. His ribs were broken. His lung was punctured. There was testimony that the perpetrators pulled his shirt over his head binding his arms so that he could not even swing his arms.

There's simply nothing in the record that would indicate that the people who were beating the complainant were

acting in self-defense, quite the contrary. It seems to have been a brutal assault, far in excess of anything that was required to subdue the complainant.

Now, I don't intend to go into any great detail with regard to the other matters on the motion to set aside the verdict either. There's only one thing I feel that deserves comment because it is not otherwise a part of this record.

In his motion to set aside the verdict, Mr. Dienst, who I assume prepared the affidavit for Sergeant Goodacre, indicates that the Court rolled its eyes, suggesting disbelief to the jury during the testimony of Police Officers Leone and Golden and since there was no contemporaneous objection, nor for that matter, any subsequent statement to (20) that effect after the testimony of either of those witnesses, I find that assertion not only inaccurate but I must say, reprehensible.

Counsel was alert throughout these proceedings; was active throughout these proceedings; appeared to have no problem in objecting whenever the Court did something that counsel thought was wrong; yet this record is bare of any assertion during the trial that the Court ever rolled its eyes and the Court specifically denies ever doing so. There is nothing I feel more strongly about than that any defendant who comes before this Court is entitled to have a fair trial and that they cannot have a fair trial if a judge indicates to the jury how that judge feels about that case.

I've always made it very clear to myself and to others that the jury will never know how I feel about a particular case when that case is being tried. I find it reprehensible that that kind of assertion, untrue in my judgment and never commented upon or remarked upon during the trial, is now asserted for the first time by way of a motion to set aside the verdict.

(21) I may say parenthetically that Sergeant Goodacre's father, who was present throughout the trial, had sent a

letter to the Court saying that he thought I was especially fair during the trial and makes no mention in his letter that I rolled my eyes skyward or any other way during the testimony of those witnesses.

These motions to set aside the verdict are denied in their entirety and defendants have exceptions to that ruling.

I should say that both sides have had the opportunity to review the pre-sentence reports. I have received a large number of letters with regard to both defendants and I've made those available to the clerk and I will ask at the end of these proceedings that those letters be attached to the pre-sentence reports for each of these defendants for any reviewing authority that wishes to look at them.

All right. Please arraign the defendants for sentence at this time.

The Clerk: Is your name Peter Grim?

The Defendant Grim: Yes.

The Clerk: Is Mr. Ganun, standing beside you (22) in court, your attorney?

The Defendant Grim: Yes.

The Clerk: Is your name Charles Goodacre?

The Defendant Goodacre: Yes.

The Clerk: Is Mr. Dienst, standing beside you in court, your attorney?

The Defendant Goodacre: Yes, he is.

The Clerk: You are each now being arraigned for sentence upon your conviction after jury trial to the crime of assault in the second degree, the one and only count of indictment 4300 of '88. Prior to the imposition of sentence, first the Assistant District Attorney, then each of your attorneys and then each of you, will have an opportunity to address the Court on any matter relative to sentence.

Miss Braver.

Ms. Braver: Your Honor, these defendants were found guilty by a jury after a full trial of the felony of assault in

the second degree, a D felony. Statute lays out a scheme of punishment with respect to that. These certainly afford the Court ample latitude within which to impose a just sentence.

(23) I would point out that, as the Court has indicated, this was a very brutal act on the part of both of these men, far in excess of a mere street fight which is what they allege, at least Mr. Ganun alleges, in his pre-sentence memorandum. This complainant was not only in the hospital for two weeks but in fact left against the orders of his doctor and was likely to have remained there longer still because of the nature of the injuries that were done to him. He was defenseless and it was a vicious act and fully qualified for the verdict of an intent to cause serious physical injury and did cause it.

I would point out that—

The Court: Excuse me. Why don't you sit down while she's talking? There's no reason to stand. Go ahead.

Ms. Braver: I would point out in this particular instance, these two gentlemen who otherwise appear to have no prior criminal history, and I'm assuming that that is so, acted in a criminal fashion; did not act while they were acting in their capacity as police officers but rather acted as civilians and as such, are subject (24) to the same laws and inhibitions as are applied to all persons in this society.

The Court, I think and I urge, should consider the following factors, though, in imposing sentence. These two gentlemen were in fact police officers at the time, although off duty officers. As such, they bore an additional responsibility to the community. It became quite apparent to a large crowd assembled in a very busy public thoroughfare on a Saturday night that the people who were committing this vicious assault on Mr. Vogelsang were in fact police officers because at least one person amongst those that were beating Mr. Vogelsang, upon responding to a person in the

crowd who said, "Leave the boy alone. Haven't you done enough," held up his hand and said, "Stay out of it. Mind your own business. I'm a police officer." By so doing and by drawing the attention of the crowd to the fact that these were police officers, albeit that they were off duty at the time, they created a very bad impression, to say the least, of the quality of the police force in general of New York City which I believe is very high.

(25) The police force in New York City is, by and large, a very responsible, caring force and they do their best to make sure that all persons are properly safeguarded under the laws of this community. These two gentlemen acted outside the laws of this community and in the manner in which they acted and the knowledge became available to the public, they caused great disillusionment on the part of the persons who were present and the part of anybody they might have spoken to with respect to the entire police force and they, in effect as well, when they took the stand and perjured themselves.

The Court: They both didn't take the stand.

Ms. Braver: They both took the stand.

The Court: Again, only one took the stand. Go ahead.

Ms. Braver: I did not cross-examine one of them, your Honor, but both of them did take the stand and they both gave similar statements. I believe they both perjured themselves in the course of this trial.

Mr. Vogelsang initially told me when I first came into this case that he was terribly distressed (26) that when he found out subsequently in the course of the case that these two gentlemen had been police officers, that in fact they were police officers, that when he had been in that area before, he had taken great pains to speak to people who were at—appearing to be outside of this community and tell them that they should cooperate with the police; the police were just there to protect them and that they were friends of

theirs and he said he didn't recall any moment in his life when he had been more disillusioned than upon finding out that the people who had beaten him were in fact themselves police officers.

The fact that one of the persons who testified in this case was, by his own words and also in defense counsel's pre-sentence memorandum, characterized as a hustler by both the statements of both these defendants does not mean that he should not be accorded the same degree of respect and protection under the laws. I believe their characterization of that witness, Mr. Johnson, as a hustler and thereby not worthy of anything, was characteristic of their contempt in general for population—for a segment of this population (27) which they believed to be—attacked themselves—to be attacking on the night of this incident.

I urge that the Court consider the factors of their being police officers in the sense that their duty to the public has been betrayed; their duty to their fellow officers has been betrayed, as well as the acts committed directly against Mr. Vogelsang, in imposing sentence upon these gentlemen within the structure that the statute requires and makes available.

The Clerk: Mr. Ganun.

The Court: Do you have a specific recommendation?

Ms. Braver: I believe incarceration is warranted, your Honor.

The Court: Beyond that, do you have any recommendation?

Ms. Braver: The felony statute, the D felony, for which they were incarcerated, mandates a state prison term whose minimum, I believe, is one to three and whose maximum term would be seven years.

The Court: No, it is not. There's no mandatory state felony—

Ms. Braver: I believe there is on this (28) assault two, it being a violent felony, your Honor.

The Court: Wrong. Mr. Ganun.

Ms. Braver: If I'm wrong on that, I still do believe that incarceration is warranted in this case and would not recommend more than the one to three which I believe the statute applies.

Mr. Ganun: Your Honor, on behalf of Peter Grim, I would just like to indicate to the Court that I'm not going to reargue the case. The Court has heard the testimony of all of the witnesses.

The District Attorney has indicated that these individuals should be treated like all other civilians. I venture to say that so far, they were police officers. As the Court knows, my client was a twenty-nine-year-old, or twenty-eight-year-old at the time, probationary police officer.

Assuming *arguendo* that he was involved in this situation, we have the statements of Mr. Vogelsang that—and taking the statements of the District Attorney that after the initial confrontation, that Mr. Vogelsang came back armed with a broomstick; that Mr. Vogelsang allegedly struck out and hit my client on the head, or he identifies my client, on the head with a bottle, struck my client in the (29) cheek with a stick causing a purple mark; that according to him, my client hit him with his fist causing his jaw to be broken. The People—the defense put up a district surgeon from New York City Police Department that testified that defendant Grim had no marks on his head, no marks on his cheek, no trauma to his knuckles.

Apparently, the jury didn't understand or was not aware of the position of the district surgeon. If the district surgeon, I submit, had found such marks, Mr. Grim would have been arrested on February 22nd, 1989.

Mr. Grim, your Honor, as indicated in a pre-sentence memorandum, has never been in trouble before. He comes

from a tight, religious family. His father happens to be a New York City firefighter. He's been that for over twenty-nine years, your Honor. Mr. Grim has—his mother is a homemaker. His two brothers have never been in trouble. Mr. Grim has never been in trouble.

I respectfully submit, your Honor, that you treat Mr. Grim as you would treat anybody faced with this type of situation with no prior criminal record. I had suggested in my pre-sentence (30) memorandum that perhaps the Court could see fit to grant to Mr. Grim probation or probation combined with community service and I had recommended in my pre-sentence memorandum that perhaps, not tongue-in-cheek or not in a sense of irony, that the community service would entail perhaps working with street people who apparently Mr. Vogelsang and Mr. Johnson were or perhaps working with an organization such as Covenant House.

Your Honor, the D. A. indicates that Mr. Vogelsang was supposedly outraged. I'd like to point out that the Probation Department has indicated that they could not even contact Mr. Vogelsang to give an impact report on this particular incident.

Based upon all of the foregoing, your Honor, I'd respectfully request that this Court take into consideration the numerous letters that have been submitted to the Court setting forth the good background of Mr. Grim. He was at the time a probationary police officer. As a result of this incident, he was forced to retire. He lost his job. It was because of probably his father, he wanted to follow his father's footsteps serving the People of the State of New York. Unfortunately, that won't come to pass. He's been tremendously penalized so far, not only himself, his wife, his family, and we respectfully request that this Court take into consideration all of the letters.

Your Honor, during the course of the trial your Honor saw fit to advise counsel that it's our responsibility to

suggest to the Court whenever we deem or see fit that he may be going awry. The Court indicated that it would accept suggestions to prevent it from making a court error.

I respectfully request that the Court take my recommendation that the Court show mercy in affording Mr. Grim a probation with community service that would be apropos to this type of case. Society is not going to be threatened by Mr. Grim doing anything in the future. If this happened, it was an aberration. The business—the fact that he was a New York City police officer, it sometimes sticks in my craw that police officers, because of their duty or supposed duty and oaths that they take, are held to extraordinarily high level with regard to—

The Court: Shouldn't they be?

(32) Mr. Ganun: Excuse me?

The Court: Shouldn't police officers be held to that high level of responsibility?

Mr. Ganun: They should, your Honor, but on the same token, these men are human beings, you know. In the case of Police Officer Grim, he was a probationary police officer, maybe hadn't, quote, gotten involved in the police family. I had suggested in my memorandum to overturn the verdict, your Honor, that it's my experience that there's been in this society that police officers have become the new minority. Everybody is biased against police officers. I'm not just saying in this case but all cases, people jump to conclusions; cops, they're accused of a crime, other cops testify in their behalf; therefore, there's this blue wall of silence or conspiracy.

Your Honor, I think Police Officer Grim should be given the benefit of any privilege that any other person in his position would be able to ask of this Court. As I indicated to you, I respectfully request that the Court consider probation and probation involved with community service. I think that the modern thinking with (33) regard to penology is to

try to have the punishment fit the crime, the situation, the individual who's charged, and I think that in this case with the factors that are here and that came through in the trial, that probation and community service would be most appropriate and society would be most satisfied.

The defendant, as I indicated, has been dismissed from the Police Department. There's no threat to him going back. I just respectfully request that the Court temper any sentence with mercy. Thank you for your time, your Honor.

The Court: All right, Mr. Grim, is there anything you wish to say?

The Defendant Grim: No, your Honor.

The Court: Mr. Dienst.

Mr. Dienst: Your Honor, on behalf of Mr. Goodacre, I'd like first to address a remark that was made by the District Attorney and that is the status of police officers. What is conspicuously absent from the remarks of the District Attorney is that a young police officer, Police Officer Leone, who testified at the trial, was attempting to do his duty and do his job that (34) particular night, sustained a very serious injury inflicted by either the persons who testified or Mr. Rodney Grant who was associated in some way with the complainant, Mr. Vogelsang. That young man has sustained serious permanent and protracted disabilities which will mandate his retirement and his career being lost from the New York City Police Department.

Your Honor, I'd like to respectfully suggest that police officers are not entitled under law to any higher standard than anybody else. They're not entitled to any greater privileges or any greater immunities than anybody else but the obverse of that is also correct. Police officers are not relegated to a watered down version of the United States Constitution and they should not be treated in a disparate manner from any other first offender that may appear before your Honor for a crime such as this. Had these circumstances rose or arisen out of the performance of their

official duties, had they be acting as police officers at the time of this incident, I think the remarks of the District Attorney might have more merit than they do at this particular point.

(35) I would just like to say, during the course of the trial and by the enormous amount of letters your Honor has received on their behalf, it was pointed out to the Court that Charles Goodacre is a quiet, peaceful young man. He is an eight-year veteran of the police force. He has made that police force his career. In those eight years, including his promotion to the rank of sergeant, he was never the subject of any departmental charges or specifications of brutality. He was decorated for his bravery. Even Police Department witnesses who appeared on behalf of the prosecution testified as to his good character, as to his good reputation, as to a peaceful, quiet guy in connection with his services with the Police Department.

I don't wish to characterize Mr. Vogelsang nor any of the other witnesses that testified. Certainly, nobody should receive a beating on behalf of anybody's hands but to suggest that in this off-duty situation that because they serve the public and put their lives on the line every day for years and years in the street that they should be penalized for that service because of a single (36) isolated off-duty incident which was counter to their whole sense of history and sense of time and place, I think is inappropriate, an inappropriate suggestion by the District Attorney. There is no connection between the acts for which these defendants stand convicted and their performances, their other duties as a police officer and to seek to impose an additional sanction and an additional penalty on them because they chose law enforcement as a career, I think is inappropriate.

Your Honor has received a letter from Father Costello who is active in the Queens courts. He knows Goodacre and Goodacre's family; has made a strong suggestion to your

Honor that incarceration, in his opinion, would not be appropriate; that a period of probation and community service would be appropriate. I suggest that the eight years that Mr. Goodacre has served this community, he has performed a significant amount of community service. Clearly, if he did in fact commit this single isolated act of abhorrent behavior, it is precisely that and I would ask the Court to take into consideration his eight years of service on the street and that all the good deeds be not (37) washed away with this single isolated bad act and this felony conviction. As your Honor knows, upon the verdict of guilty being—coming in, Charles Goodacre forfeited eight years of contributions to his pension fund, all future career paths and opportunities with the New York City Police Department. Should some court at some particular point in time vacate the sentence or set aside this verdict, or vacate the judgment, that will not reinstate Mr. Goodacre to the Police Department. The Court of Appeals has definitively ruled that a public official who is found guilty by a jury verdict of a felony forfeits his office and there is—should he be exonerated from these charges at some point down the road by an appellate court, if there is an appeal in this situation, would not result in his restoration to his duty. Certainly, his dignity and respect that he held in the community will never be restored.

For all practical purposes, by this verdict, Sergeant Goodacre is now homeless; homeless in the sense of not having a career; homeless in the sense of not having a job; homeless in the sense that his (38) entire pension and future and salary and benefits and honors have all been stripped of him.

In addition to that, there is pending in the Civil Court of the Supreme Court, civil side, a multimillion-dollar action for monetary damages. The finding of guilt in this particular case will be *res judicata* or at least collaterally estopped Mr. Goodacre from asserting any defense to any claims for

monetary damages brought by Mr. Vogelsang. Your Honor recalls at the trial you heard the telephone numbers that were being demanded in connection with this case.

The man's life is shattered. His career is shattered. His conviction has brought disgrace to his father who served in the Police Department for many many years. His family is here. He's been stigmatized and disgraced in the eyes of the entire community. With the totality of the significant punishments that have already been imposed, I respectfully suggest to your Honor that the imposition of a jail sentence would be inappropriate under the circumstances.

Again, I don't wish to attribute any greater or lesser degree of responsibility as to what (39) transpired in that street that night during those few minutes. Your Honor heard the testimony. Your Honor heard of the passive aspect of Mr. Goodacre's participation as found by the jury. I'd ask your Honor to consider the letters that were sent, perhaps even consider my remarks that I've made to the Court and in the interests of finding fairness, in the interests of justice, impose a sentence of probation on behalf of Mr. Goodacre. Thank you.

The Court: Mr. Goodacre, do you have anything to say?

The Defendant: No, your Honor.

The Court: The record should reflect that the Court is satisfied that the jury's verdict was warranted by the evidence. In other words, I'm satisfied that these defendants arguably are guilty of the crimes of which they have been convicted even though they continue to deny that fact.

Their continuing denial of that fact makes it difficult to understand the exact circumstances in which this assault took place. We have the testimony of the complainants but the defendants have denied us their version of that fact. It is clear that there was some kind of verbal (40) confrontation initially between the complainant, Mr. Vogelsang, and Police Officer Grim and that that escalated to a level of

extraordinary rage which resulted in Officer Grim and then Sergeant Goodacre in viciously and repeatedly assaulting a person who was at the time helpless to defend himself. He was on the ground. His arms were restrained and he was repeatedly beaten while police force was used, albeit off-duty, to keep the crowd from assisting that person.

I do not believe that I have any bias against police officers. I believe that they have a very difficult job. I do believe, however, that public service is a public trust and that when police officers take their oath and take their arms, they undertake a level of responsibility and restraint which they are not free to discard and which these officers did discard and compounding what they did was what they did after the assault.

In my view, they engaged in a process that would cover up, confuse and mislead authorities and that that continued throughout the entire process of this investigation. I believe that these gentlemen have no prior record. They have good (41) families. I don't believe they pose any threat to this community but I do believe that the criminal law exists to punish wrongdoing and to assert moral condemnation of acts which are serious and violent and unjustified and I believe that we must be held responsible for what we do.

These were not mistakes. These were wrongs. These were wrongs engaged in by police officers who, more than others, should have been aware of their public obligation to keep the peace. They violated that obligation and it seems to me, they are to be held responsible for it. I am not satisfied that a probationary sentence is sufficient response by society. I'm aware that they have lost their police positions but it seems to me any public officer who commits a crime loses is his public position. It seems to me there must be a deterrent impact to the sentence that we impose.

I'm mindful that the District Attorney is wrong when she says I am obliged to impose a state prison sentence. I am not obliged to do that. I could impose a probationary sen-

tence but given the excessiveness of this assault, the severe injuries (42) that were inflicted upon a person who was helpless to defend himself at the time that it occurred and given the actions that they engaged in after that was done, it seems to me appropriate that a state prison sentence be imposed and it is the judgment of the Court that each defendant be sentenced to an indeterminate sentence the minimum of which shall be no less than one year and the maximum of which shall be no more than three years.

I am mindful that my view may not be shared by others, even in the judiciary, and I therefore indicate to counsel that I will stay the execution of that sentence to July 26th, four weeks from today, to afford counsel ample opportunity to seek a further stay from the Appellate Division.

Please advise counsel the defendants of their rights to appeal and advise me that you've done so. Have you advised them of their right to appeal?

Mr. Dienst: Yes, your Honor, I have.

The Court: The record should reflect that each defendant has been provided with an information sheet that indicates to him how he may perfect his appeal, if he wishes to do so. The defendant's parole will be continued until (43) July 26th. Absent a stay, they should be prepared to surrender at that time. Obviously, if there is a stay, then we'll work out a different adjourned date at that time.

You may step out at this time.

Mr. Ganun: Thank you.

THIS IS TO CERTIFY that the foregoing is a true and correct transcript of proceedings had upon the aforementioned matter.

JOYCE HOUNSELL
Court Reporter